

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
ASSIGNED ON BRIEFS JUNE 17, 2009

**STATE OF TENNESSEE *ex rel* PATRICIA McANALLY v.
BRIAN McANALLY**

**Direct Appeal from the Chancery Court for Moore County
No. 2196 J. B. Cox, Chancellor**

No. M2008-02454-COA-R3-CV - Filed October 8, 2009

Appellant was found guilty of criminal contempt for failing to pay his child support and arrearage payments, and was sentenced to ten days in jail, to be served over five weekends. After reporting to the jail to serve his fifth weekend, Appellant was told that he could not be booked because he had not paid his “jail fees.” Subsequently, Appellant was, again, found guilty of criminal contempt, for “fail[ing] to pay fees at the Moore County Jail.” Because the record contains no lawful order requiring Appellant to pay “jail fees,” we find that the trial court abused its discretion in finding Appellant guilty of criminal contempt for failing to pay such fees.

**Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Chancery Court Vacated and
Remanded**

ALAN E. HIGHERS, P.J., W.S., delivered the opinion of the court, in which DAVID R. FARMER, J., and HOLLY M. KIRBY, J., joined.

S. Craig Moore, Fayetteville, TN, for Appellant

Robert E. Cooper, Jr., Attorney General and Reporter; Warren A. Jasper, Senior Counsel, Nashville, TN, for Appellee

MEMORANDUM OPINION¹

I. FACTS & PROCEDURAL HISTORY

Brian McAnally and Patricia McAnally were divorced in February 2007, at which time Mr. McAnally was ordered to pay \$94.16 weekly in child support. On May 29, 2007, the State of Tennessee *ex rel.* Patricia McAnally (“the State”) filed a “Petition for Show Cause in Contempt Proceedings” against Mr. McAnally, claiming that he had willfully failed to pay the required child support. On that same day, the trial court entered an order requiring Mr. McAnally to appear in court on July 16, 2007, to show cause why he should not be held in contempt. Mr. McAnally was served with the order on June 25, 2007.

Mr. McAnally failed to appear in court on July 16, 2007, and an attachment was issued, setting a bond of \$1,000.00 for his appearance on August 20, 2007. The August 20, 2007 hearing on the show cause petition was continued until an October 1, 2007 compliance hearing. After the October 1, 2007 hearing, the trial court entered an order increasing Mr. McAnally’s child support payment and requiring him to pay child support arrearage. In its order, the trial court also found Mr. McAnally guilty of criminal contempt and sentenced him to ten days in jail, suspended upon timely payment of child support and arrears.

On January 7, 2008, Mr. McAnally filed a uniform affidavit of indigency, and an attorney was appointed to represent him. Following a hearing on March 3, 2008, Mr. McAnally’s suspended ten-day sentence was revoked for non-compliance, but he was allowed to serve his sentence on five consecutive weekends. According to Mr. McAnally, he began serving his sentence, but upon reporting to jail to serve his fifth and final weekend, he was told he was “free to go[,]” as he could not be “booked or processed in” because he had not paid his “jail fees.”²

On June 2, 2008, the State filed a “Notice Pursuant to Rule 42,” notifying Mr. McAnally that he was, again, charged with criminal contempt. A show cause order was issued requiring Mr. McAnally to show cause on July 7, 2008, as to why he should not be held in contempt for failing to report to the jail, failing to serve his ten-day sentence, and failing to pay his jail fees. On July 7, 2008, Mr. McAnally filed a uniform affidavit of indigency, and an attorney was appointed for him.

¹ Rule 10 of the Rules of the Court of Appeals of Tennessee provides:

This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated “MEMORANDUM OPINION,” shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

² In his “Statement of Evidence and Proceedings,” Mr. McAnally states that a “Jail representative testified the Jail charged McAnally a \$5.00 fee each weekend for booking and processing, and a \$2.00 fee for the first weekend for a set of hygiene products.”

After a continuance, a hearing was held on July 21, 2008. At that hearing, both Mr. McAnally and a Moore County Jail representative testified that Mr. McAnally served four of the five required weekends for his initial contempt charge. However, the jail representative testified that because Mr. McAnally did not pay the required “jail fees,” when he arrived to serve the final weekend, he was told he was “free to go,” as he could not be “booked or processed.” In a July 25, 2008 order, the trial court found Mr. McAnally “in willful contempt of Court for his *failure to pay fees* at the Moore County Jail[,]” and it sentenced Mr. McAnally to thirty days in jail to be served on fifteen consecutive weekends. (emphasis added).

On August 29, 2008, Mr. McAnally filed a “Motion for Reconsideration,” asserting that pursuant to Tennessee Code Annotated section 40-7-122,³ the Moore County Jail improperly assessed “jail fees” against him, as he had been declared indigent by the court. Before Mr. McAnally’s motion was heard, he began serving his second contempt sentence, and he completed six of the fifteen weekends. After the hearing, the trial court entered an order, on September 30, 2008, finding that “as [Mr. McAnally] was employed when declared indigent both in January and July, 2008, [he] should have been considered indigent for the purposes of appointing counsel, but financially able to defray a portion or all of the cost of his representation under Tenn. Code Ann. § 40-14-202(e).” Therefore, the trial court ordered Mr. McAnally to serve the remainder of his sentence—nine weekends—paying the \$5.00 fee each weekend. Mr. McAnally filed a “Notice of Appeal” on October 28, 2008, and the remainder of his sentence was stayed pending appeal.

II. ISSUES PRESENTED

Appellant has timely filed his notice of appeal and presents the following issues for review, slightly restated as follows:

1. Whether the trial court abused its discretion by finding Mr. McAnally in contempt of court, a second time, in July of 2008;
2. Whether, in light of Tenn. Code Ann. § 40-7-122, Mr. McAnally could be found in contempt of court for not paying the Moore County Jail’s fees when he had been declared indigent by the court; and

³ Tennessee Code Annotated section 40-7-122 provides:

In addition to any other fees the sheriff is entitled to demand and receive in accordance with § 8-21-901, a county legislative body may vote to impose an additional fee of not more than ten dollars (\$10.00) for the booking and processing of each person subject to arrest or summons. The fee shall be collected at the same time and in the same manner as other fees are collected by a sheriff in accordance with title 8, chapter 21, part 9. *The fee shall not be charged to any person determined by the court to be indigent.* (emphasis added).

3. Whether the trial court abused its discretion in sentencing Mr. McNally to thirty days of incarceration for his second contempt charge.

For the following reasons, we vacate the chancery court's September 30, 2008 order finding Mr. McNally in contempt for failing to pay his "jail fees." We remand to the trial court for further proceedings to address whether Mr. McNally has fulfilled his obligations pursuant to the original contempt finding—the March 12, 2008 "Order With Incarceration."

III. STANDARD OF REVIEW

In cases of criminal contempt, the guilt of the accused must be initially established beyond a reasonable doubt. *Memphis Health Ctr., Inc. ex rel. Davis v. Grant*, No. W2004-02898-COA-R3-CV, 2006 WL 2088407, at *14 (Tenn. Ct. App. July 28, 2006) (citing *Black v. Blount*, 938 S.W.2d 394, 398 (Tenn. 1996); *Robinson v. Air Draulics Eng'g Co.*, 377 S.W.2d 908, 912 (Tenn. 1964)). "However, on appeal, individuals convicted of criminal contempt lose their presumption of innocence and must overcome the presumption of guilt." *Id.* "Appellate courts do not review the evidence in a light favorable to the accused and will reverse criminal contempt convictions only when the evidence is insufficient to support the trier-of-fact's finding of contempt beyond a reasonable doubt." *Id.* (citing Tenn. R. App. P. 13(e); *Thigpen v. Thigpen*, 874 S.W.2d 51, 53 (Tenn. Ct. App. 1993)). "Furthermore, appellate courts review a trial court's decision of whether to impose contempt sanctions using the more relaxed abuse of discretion standard of review." *Id.* (citing *Hawk v. Hawk*, 855 S.W.2d 573, 583 (Tenn. 1993)).

IV. DISCUSSION

"Tennessee courts have the inherent authority and discretion to punish for acts of contempt." *Outdoor Mgmt., LLC v. Thomas*, 249 S.W.3d 368, 376 (Tenn. Ct. App. 2007) (citing *Reed v. Hamilton*, 39 S.W.3d 115, 117 (Tenn. Ct. App. 2000)). However, such a finding can only be made for conduct described in Tennessee Code Annotated section 29-9-102. *Id.* (citing *Black*, 938 S.W.2d at 397-98). Among the conduct for which courts may punish as contempt is "[t]he willful disobedience or resistance of any officer of the said courts, party, juror, witness, or any other person, to any lawful writ, process, order, rule, decree, or command of such courts." *Id.* (quoting Tenn. Code Ann. § 29-9-102(3)). The Tennessee Code's language is clear as to the two elements required for a contempt finding under section 29-9-102(3): (1) willful disobedience or resistance, and (2) a lawful writ, process, order, rule, decree, or command of such courts. *Id.* (citing Tenn. Code Ann. § 29-9-102(3); *State v. Winningham*, 958 S.W.2d 740, 745 (Tenn. 1997)).

Tennessee Code Annotated section 40-7-122 allows county legislative bodies to impose a "booking fee" of not more than ten dollars. According to the State, "[t]ypically, there would not exist a court order to pay jail fees in conjunction with incarceration. The fees are assessed pursuant to statute." The State concedes that "[i]t is unclear from the record that a lawful order regarding 'jail

fees’ was willfully disobeyed.” Acknowledging the absence of an order requiring Mr. McNally to pay “jail fees,” the State does not seek an affirmance in this case.

It seems that the trial court intended to base its contempt finding on Mr. McNally’s failure to fully serve his ten-day jail sentence. However, because the trial court’s stated basis for its contempt finding was Mr. McNally’s “failure to pay fees at the Moore County Jail”—which were not ordered to be paid—we find that the elements for contempt have not been shown. Accordingly, we vacate the trial court’s order finding Mr. McNally in contempt for failing to pay such fees.

V. CONCLUSION

For the aforementioned reasons, we vacate the trial court’s July 21, 2008 order finding Mr. McNally in contempt for “failure to pay his fees at the Moore County Jail.” We remand to the trial court for further proceedings to address whether Mr. McNally has fulfilled his obligations pursuant to the March 12, 2008 “Order With Incarceration.” All issues not herein addressed are pretermitted. Costs of this appeal are taxed to Appellee, State of Tennessee *ex rel.* Patricia McNally.

ALAN E. HIGHERS, P.J., W.S.